

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

FLORIDA POULTRY FEDERATION, INC.,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 97-5691
	)	
DEPARTMENT OF AGRICULTURE AND	)	
CONSUMER SERVICES,	)	
	)	
Respondent.	)	
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RECOMMENDED ORDER

Pursuant to notice, a formal hearing was conducted in this case on March 13, 1998, in Tampa, Florida, before Lawrence P. Stevenson, a duly designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Charles R. Smith  
Executive Vice President  
Florida Poultry Federation, Inc.  
4508 Oak Fair Boulevard, Suite 290  
Tampa, Florida 33610

For Respondent: John N. Spivey, Esquire  
Department of Agriculture and  
Consumer Services  
407 South Calhoun Street  
Room 515, Mayo Building  
Tallahassee, Florida 32399-0800

STATEMENT OF THE ISSUE

Whether Petitioner has standing to bring this proceeding and, if so, whether Petitioner is entitled to a waiver or

variance of Rule 5K-4.021, Florida Administrative Code, pursuant to Section 120.542, Florida Statutes.

#### PRELIMINARY STATEMENT

By Petition for Variance or Waiver dated August 1, 1997, Petitioner requested a waiver from the provisions of Rule 5K-4.021, Florida Administrative Code, on behalf of six affected shell-egg plants that are members of Petitioner's organization. By letter dated October 27, 1997, Respondent denied the petition for waiver. On November 12, 1997, Petitioner timely filed its request for formal proceeding to contest the petition denial. On December 2, 1997, Respondent forwarded the request for formal proceeding to the Division of Administrative Hearings for assignment of an Administrative Law Judge and the conduct of a formal hearing.

On January 16, 1998, Respondent filed a Motion to Dismiss for Lack of Standing. Respondent's motion argued that Petitioner itself is not subject to the rule in question, though some of its member companies may be. After a telephonic hearing, Respondent's motion was denied, though Respondent was granted leave to raise the issue of standing again in its post-hearing submissions.

On January 22, 1997, Respondent filed a Motion to Amend Petition Denial, in which it sought to raise additional grounds

to justify denial of the petition for variance. Petitioner did not object to the Motion to Amend, which was granted by Order dated February 11, 1998.

At the hearing, Petitioner presented the testimony of Charles R. Smith, Executive Vice President of the Florida Poultry Federation. Respondent presented the testimony of John T. Fruin, Chief of the Bureau of Food and Meat Inspection, Division of Food Safety of the Department of Agriculture and Consumer Services; Wayne Derstine, Environmental Administrator in the Bureau of Food and Meat Inspection; and Bobby Bickley, Biological Administrator in the Department of Agriculture and Consumer Services. All three of Respondent's witnesses were accepted without objection as experts in food safety.

Petitioner offered two exhibits, which were admitted without objection. Respondent offered seven exhibits, which were admitted without objection.

The transcript of the final hearing was filed with the Division of Administrative Hearings on March 13, 1998. Petitioner filed a proposed recommended order on March 18, 1998. Respondent filed a proposed recommended order on March 27, 1998.

#### FINDINGS OF FACT

Upon consideration of the oral and documentary evidence adduced at the hearing, the following relevant findings of fact are made:

1. Rule 5K-4.021, Florida Administrative Code, provides in operative part that food establishments with four or more employees present at the same time engaged in food establishment operations must have at least one certified food manager present in the food establishment during all phases of food establishment operation. The food manager is responsible for and must actively oversee all food establishment operations. Food establishments with fewer than four employees engaged in food establishment

operations at the same time must also have a certified food manager, but that food manager need not be present at all times.

2. The rule provides for written testing of persons seeking certification as food managers. The test is designed to allow the applicant to demonstrate knowledge of food protection and food safety principles and practices.

3. The rule defines "food establishment operation" as the manufacturing, processing, packing, holding or preparing of food or selling food at wholesale or retail at a food establishment regulated by the Department of Agriculture and Consumer Services pursuant to Chapter 500, Florida Statutes.

4. Petitioner is an industry association comprising nearly all of the poultry industry in the State of Florida. Petitioner's membership includes eight shell-egg producers and three broiler producers.

5. Petitioner concedes that its shell-egg producer members are "food establishment operations" that are subject to Rule 5K-4.021, Florida Administrative Code, absent the variance sought in this proceeding or some other exemption therefrom.

6. At the time Petitioner filed its Petition for Variance or Waiver, six of its member shell-egg producers were subject to Rule 5K-4.021, Florida Administrative Code.

7. At the time of the hearing, only one of Petitioner's member shell-egg producers was subject to the rule. Subsequent

to the filing of the Petition, the other five members had become full-time United States Department of Agriculture (USDA) certified plants. Respondent concedes that USDA plants are automatically exempt from Rule 5K-4.021, Florida Administrative Code.

8. Petitioner's reason for requesting the variance or waiver is, essentially, that the rule "does nothing" in relation to shell-egg plants. Petitioner alleges that the purpose of the rule is to monitor retail food establishments, i.e., those that are pre-packaging for sale, or directly preparing food for sale to be consumed on or off the premises as prepared or packaged.

9. Petitioner contends that shell-egg plants do not fall under those criteria. Petitioner alleges that a shell-egg plant only cleans, grades and packages the shell egg, and that the edible portion of the egg is not touched by human hands or packaged in such a manner as to be consumed "as is."

10. Petitioner argues that the requirements of the rule duplicate safety measures already required by law of shell-egg producers, and that a waiver would not affect food safety because the egg is in no way compromised by the processing that occurs on the premises of a shell-egg plant.

11. In its Petition Denial, Respondent disputes that either Chapter 500, Florida Statutes, or the rules promulgated thereunder are limited to retail food establishments.

Respondent points out that the United States Food and Drug Administration has determined that a shell egg is a potentially hazardous food, and that the examination for food manager covers the proper handling of potentially hazardous foods, making its provisions applicable to and desirable for shell-egg plants.

12. In its Amended Petition Denial, Respondent set forth the following additional justifications for applying the food manager requirement to shell-egg plants:

1. A certified food manager with knowledge of potential biological, chemical, and physical sources of foodborne disease and illness is needed at all egg processing plants to safeguard the public health and promote the public welfare.

2. A certified food manager with knowledge of proper food storage techniques is needed at all egg processing plants to safeguard the public health and promote the public welfare.

3. A certified food manager with knowledge of proper selection, use and care of equipment and utensils is needed at all egg processing plants to safeguard the public health and promote the public welfare.

4. A certified food manager with knowledge of proper cleaning and sanitizing procedures is needed at all egg processing plants to safeguard the public health and promote the public welfare.

5. A certified food manager with knowledge of proper pest control and supply storage protocol is needed at all egg processing plants to safeguard the public health and promote the public welfare.

6. A certified food manager with knowledge of proper facility maintenance and operation is needed at all egg processing plants to safeguard the public health and promote the public welfare.

13. Respondent's expert witnesses affirmed that the yolks of shell eggs provide an excellent medium for the growth of harmful bacteria, including salmonella enteritidis, which can cause serious illness or even death in humans.

14. Respondent's witnesses also testified as to cleanliness and hygienic problems that they have observed in shell-eggs plants they have inspected as part of their duties, problems they believe could be addressed more efficiently by the constant presence of a certified food manager, as opposed to the periodic inspections conducted by Respondent's agents.

15. Petitioner stipulated, and the proof demonstrated, that compliance with Rule 5K-4.021, Florida Administrative Code, would not create a substantial hardship on its members. Compliance would not create an economic, technological, legal or other type of hardship for Petitioner's members.

16. Petitioner stipulated, and the proof demonstrated, that application of the rule to Petitioner's members would not affect those members any differently than it affects other similarly situated persons who are subject to the rule.

#### CONCLUSIONS OF LAW



17. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties hereto pursuant to Sections 120.542 and 120.57(1), Florida Statutes.

18. Respondent challenges Petitioner's standing to bring this proceeding, relying upon the following language in Section 120.542(2), Florida Statutes:

Variances and waivers shall be granted when the person subject to the rule demonstrates that the purpose of the underlying statute will be or has been achieved by other means by the person and when application of the rule would create a substantial hardship or would violate principles of fairness. (Emphasis added.)

19. Respondent argues that Petitioner, as an industry association, is not a "person subject to the rule." The Florida Poultry Federation does not process eggs and is not required to have a certified food manager on premises; it is an industry association that represents the interests of its members before the public and governmental entities.

20. Respondent argues that the standards for associational standing found in Florida Home Builders Assoc. v. Dept. of Labor and Employment Security, 412 So. 2d 351 (Fla. 1982), do not apply in this instance because the Legislature has here expressly limited standing to seek a variance to "persons subject to the rule."

21. Respondent's argument in this regard is rejected.

Florida appellate courts have not as yet addressed the standards for associational standing as applied to Section 120.542(2), Florida Statutes. However, the Florida Home Builders court set forth those standards in relation to a rule challenge brought pursuant to Section 120.56(1), Florida Statutes (1979). The statute at that time provided:

Any person substantially affected by a rule may seek an administrative determination of the invalidity of the rule on the ground that the rule is an invalid exercise of delegated legislative authority. (Emphasis added.)

22. Respondent's argument in the instant case is virtually identical to that rejected by the court in Florida Home Builders: that the subject association was not "substantially affected" by or "subject to" the rule. The undersigned concludes that the same standard should apply in this variance proceeding as has been applied in other Chapter 120 proceedings, particularly in light of the following admonition by the Court in Florida Home Builders:

Expansion of public access to the activities of governmental agencies was one of the major legislative purposes of the new Administrative Procedure Act. In our view, the refusal to allow this builders' association, or any similarly situated association, the opportunity to represent the interests of its injured members in a rule challenge proceeding defeats this purpose by significantly limiting the public's ability to contest the validity of agency rules. While it is true that the

"substantially affected" members of the builders' association could individually seek determinations of rule invalidity, the cost of instituting and maintaining a rule challenge proceeding may be prohibitive for small builders. Such a restriction would also needlessly tax the ability of the Division of Administrative Hearings to dispose of multiple challenges based upon identical or similar allegations of unlawful agency action.

Florida Home Builders, 412 So. 2d at 352-53.

23. It is also significant that the lower appellate courts have expanded the associational standing rationale to Section 120.57(1) formal proceedings and Section 120.565 declaratory statement petitions. See Farmworker Rights Organization, Inc. v. Dept. of Health and Rehabilitative Services, 417 So. 2d 753 (Fla. 1st DCA 1982) and Federation of Mobile Home Owners of Florida, Inc. v. Dept. of Business Regulation, 479 So. 2d 252 (Fla. 2d DCA 1985).

24. The standards by which an association such as Petitioner may claim standing to proceed on behalf of its members are as follows:

(1) the association must demonstrate that a substantial number of its members, though not necessarily a majority, are substantially affected by the challenged agency action;

(2) the subject matter of the challenged action is within the association's general scope of interest and activity; and

(3) the relief requested is of a type appropriate for a trade association to receive on behalf of its members.

Florida Home Builders, 412 So. 2d at 353-54. In this proceeding, Petitioner must demonstrate that a substantial number of its members are "persons subject to the rule" from which waiver is sought. In all other respects, the standard is the same in this variance proceeding as in any other Chapter 120 proceeding.

25. At the time of the hearing, only one of the eight shell-egg producers that are members of Petitioner's organization was subject to the rule. While the courts have held that a "substantial" number need not constitute a majority, it must include more than just a token number of the members if the action is to be maintained by the association. A single member of Petitioner's organization cannot be said to constitute a "substantial" number. Petitioner has failed to meet the first prong of the test for associational standing set forth in Florida Home Builders.

26. Petitioner does appear to meet the second two prongs for associational standing. Petitioner represents its members' interests before government agencies, and the rule at issue would fall within the general scope of Petitioner's interest and activity on behalf of its members. Obtaining a variance or waiver from an administrative rule would be a form of relief

appropriate for Petitioner to seek on behalf of one of its members.

27. Nonetheless, because Petitioner's claim is based on its representative capacity as an association, and only one of its member companies is subject to the rule in question, Petitioner has failed to demonstrate that it has standing to bring this proceeding.

28. Even if it had standing, Petitioner failed to demonstrate entitlement to a variance under the standards set forth in Section 120.542(2), Florida Statutes. Petitioner conceded that compliance with the rule does not create a substantial hardship, nor does it violate principles of fairness, as those terms are employed in the statute.

29. Respondent redundantly demonstrated that the application of Rule 5K-4.021, Florida Administrative Code, to shell-egg plants is within its statutory mandate, and is reasonably related to its responsibilities regarding safeguarding the public health. Even if Petitioner's claim that the rule "does nothing" were cognizable under Section 120.542(2), Florida Statutes, as a ground for waiver or variance, Petitioner failed to demonstrate that Rule 5K-4.021, Florida Administrative Code, does not serve a salutary purpose as it relates to the one shell-egg plant to which it applies.

RECOMMENDATION

Based on the foregoing findings of fact and conclusions of law, it is

RECOMMENDED that the Department of Agriculture and Consumer Services enter a final order dismissing the petition for formal proceeding and affirming its denial of the Petition for Variance or Waiver of Rule 5K-4.021, Florida Administrative Code.

DONE AND ENTERED this 6th day of May, 1998, in Tallahassee, Leon County, Florida.

Hearings

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LAWRENCE P. STEVENSON  
Administrative Law Judge  
Division of Administrative

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Hearings

Filed with the Clerk of the  
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this 6th day of May, 1998.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this recommended order. Any exceptions to this recommended order should be filed with the agency that will issue the final order in this case.